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In the Supreme Court of the United States

OCTOBER TERM, 1956

No. 985

THE KANSAS CITY STAR COMPANY, PETITIONER

v.

UNITED STATES OF AMERICA

No. 986

EMIL A. SEES, PETITIONER

v.

UNITED STATES OF AMERICA

PETITIONS FOR WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the Court of Appeals (Pet. No. 985, -37a) is reported at 240 F. 2d 643.

JURISDICTION

The judgments of the Court of Appeals were entered January 23, 1957 (Pet. No. 985, 1b; No. 986, B1), d petitions for rehearing were denied on March 13,

1957. The time for petitioning was extended by Mr. Chief Justice Warren on April 2, 1957, to May 12, 1957. The petitions for writs of certiorari were filed on May 10, 1957. The jurisdiction of this Court is invoked under 28 U. S. C. 1254 (1).

QUESTIONS PRESENTED

Petitioner Kansas City Star Company ("Star") was convicted of an attempt to monopolize and of monopolizing, and petitioner Sees (its advertising director) was convicted of attempting to monopolize, interstate trade and commerce in the dissemination of news and advertising by daily newspapers and radio and television broadcasting stations in metropolitan Kansas City, in violation of Section 2 of the Sherman Act. The following questions are presented:

1. Whether the District Court properly left it to the jury to decide whether the "relevant market" for determining Star's monopoly power over the dissemination of news and advertising in metropolitan Kansas City was limited to daily newspapers and radio and television stations in that area rather than, as petitioners contended, all other media engaged in the dissemination of news and advertising in that area.

2. Whether the Court of Appeals correctly held that, under all the circumstances shown by the record, the jury would have been justified in concluding that Star used the unit advertising rate and the forced combination subscription rate with the intent and effect of excluding competition.

3. Whether the District Court correctly charged the jury that, if Star had both monopoly power and the

intent to exercise such power, it might be convicted of monopolization whether or not it actually exercised the power.

4. Whether the District Court erred in defining attempt to monopolize as acts and practices done with the specific intent to achieve monopoly and which, if successful, "would be likely to accomplish monopolization", rather than as conduct which had a "dangerous probability" of achieving monopoly.

5. Whether petitioner Sees was denied a fair trial by being tried jointly with Star.

STATUTE INVOLVED

Section 2 of the Act of July 2, 1890, 26 Stat. 209, 15 U. S. C. 2, commonly known as the Sherman Act, provides:

> Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a misdemeanor, and, on conviction thereof, shall be punished by fine not exceeding five thousand dollars, or by imprisonment not exceeding one year, or by both said punishments, in the discretion of the court.

STATEMENT

On January 6, 1953, in the District Court for the Western District of Missouri, an indictment was returned (R. 3–14) charging petitioners with violating Section 2 of the Sherman Act. Petitioner Kansas City Star Company ("Star") publishes in Kansas

City, Missouri, a morning daily newspaper known as *The Kansas City Times* ("morning *Times*"), an evening daily newspaper known as *The Kansas City Star* ("evening *Star*"), and a Sunday newspaper known as *The Sunday Star* ("*Sunday Star*"). Star also owns and operates in that city a radio station and a television station. Petitioner Sees is Star's director of advertising, its treasurer, and a member of its board of directors.

The indictment charged that each petitioner had attempted to monopolize (Count I), and had monopolized (Count II), interstate trade and commerce in the dissemination, through daily newspapers of general circulation and radio and television broadcasting stations, of news and advertising in a four county area comprising metropolitan Kansas City.

After a lengthy trial, Star was convicted on both counts and Sees was convicted only of attempting to monopolize (Count I) (R. 283–284). The District Court, concluding that the offense of attempting to monopolize merged in the greater offense of monopolization (R. 327, 331), imposed a single fine of $5,000 upon Star, and a $2,500 fine upon Sees (R. 330–332). The Court of Appeals for the Eighth Circuit, in a detailed opinion (Pet. No. 985, 1a–37a), unanimously affirmed both convictions.

STAR'S DOMINANT POSITION IN THE MARKET

The Court of Appeals held (Pet. No. 985, 14a) that it was "apparent" that Star had a " 'dominant' position as to both circulation and advertising in the

daily newspaper field in Metropolitan Kansas City." The court pointed out (*id.*, 13a–14a) that, during the period covered by the indictment, Star's newspapers covered 95% of all households and represented more than 94% of total daily newspaper circulation in the metropolitan Kansas City area; and Star received 94% of total area advertising revenues for daily newspapers and 84% of such revenues for daily newspapers and radio and television stations.

From 1936 (the evidentiary cut-off date set by the trial court, R. 232, 234–5) to the return date of the indictment, the morning *Times* was the only morning newspaper of general circulation in metropolitan Kansas City. The only significant competition faced by the evening *Star* during that period came from the *Kansas City Journal-Post* (GX 3, R. 1219, 2543; R. 1909), the circulation of which was approximately one-third that of the evening *Star* (GX 3, R. 1219, 2543) and which ceased publication in 1942 (R. 1909). After 1942, Star's morning and evening papers were the only daily newspapers of general circulation in metropolitan Kansas City; the largest competing paper, the *Kansas City Kansan,* circulated only in the state of Kansas and had a total circulation in 1952 of 27,873, as contrasted with a circulation of 708,000 for the two Star papers (GX 187, R. 1863, 2781; R. 2017).

STAR'S PREDATORY AND EXCLUSIONARY PRACTICES

Petitioners do not discuss the extensive evidence upon which the jury based its verdicts. However, in

view of Star's contention (Pet. No. 985, p. 6) that the holding of Sherman Act violations rests on the fact that Star "as the largest daily newspaper in Kansas City, is in a 'dominant' position and that therefore, *ispo facto*, it has 'monopoly power,'" we believe it may be helpful to this Court to summarize the findings of the court below with respect to the various predatory and exclusionary practices by which Star acquired and maintained its monopoly power, and to set forth a few illustrative examples shown in the record.

The Court of Appeals held (Pet. No. 985, 14a) that the evidence showed that Star's two newspapers were "an indispensable advertising medium for many advertisers";[1] that Star "threatened" advertisers who used competitive papers with (1) "refusal to take their ads," (2) "loss of desirable position," (3) "having their credit cut off," (4) denial of news coverage to advertisers, and (5) discontinuing their

[1] A number of metropolitan Kansas City advertisers so testified. R. 388, 470, 795, 848, 900, 945, 1056, 1130, 1198–1199, 1298, 1415, 1463, 1570, 1573, 1658. The indispensability of these newspapers was further demonstrated by evidence that, following a warning from Star, these advertisers almost invariably consented to stop using competing local publications rather than endanger their advertising in Star's papers. R. 378–379, 438–439, 469–470, 706–708, 739–741, 755–758, 937–938, 1131–1132, 1135–1137, 1262–1263, 1298–1300, 1333–1335, 1365–1369, 1412–1415, 1462–1463, 1477–1478, 1505–1507, 1520–1521, 1573–1574, 1654–1655, 1663–1664; GX 137–144, R. 920, 921, 923, 925, 926, 927, 2735–2746. As one advertiser put it (R. 1415): "* * * when the Star is the bread and butter to our business or any other business it is, and it is important to us, you don't want to do anything that will endanger your position with them * * *."

ads, "unless The Star was given 'equal space' with competitive publications, regardless of how limited their circulation and the fact that 'equal space' in a large publication such as The Star would cost a great deal more than the same space in one of its small competitors" (*id.*, 15a–16a); and that Star had used its "dominant position * * * to dictate to advertisers how much of their advertising quota would have to be spent" in its papers (*id.*, 17a), and had used its dominant position as the owner of the only television station in the area from 1949 to 1953 "to aid in its newspaper advertising, making it clear in some instances that advertisers could not buy time" on such station "unless they also advertised in The Star papers" (*id.*, 18a).[2]

The court further held (*id.*, 21a–22a) that the record "could justify the jurors' conclusion" (1) that "the morning Times and evening Star were two separate newspapers with distinct and separate uses for advertisers" [and not, as petitioners contended, a single newspaper with 13 issues per week (*id.*, 19a–20a)],[3] and (2) that Star's unit advertising rate, under which classified and general advertisers were required to place their ads in both the morning *Times*

[2] In 1952, a Star representative, after tentatively agreeing to sell television time to a furniture company, pointed out that the company was not doing any newspaper advertising. When the company stated that it had no need therefor, it was told, "Well, in that case we don't have any time available for you at the present. What time is available is for our regular advertisers" (R. 1441, 1443).

[3] The evidence showed that the papers had different mastheads, and carried different news, editorials, comics, syndicated

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and the evening *Star*, was "used, notwithstanding the protests of advertisers, with the intent and effect of excluding competition." The court also ruled (*id.*, 22a) that the jury "could properly conclude" from the evidence that the effect upon the average subscriber of the *Star's* practice of requiring subscribers to "subscribe to the morning Times and the evening Star in combination with The Sunday Star for a total of thirteen papers per week for a single price" (*id.*, 18a) "is to foreclose the likelihood he will purchase other competing papers," with a "self-evident" "result on circulation of smaller papers in the area" (*id.*, 22a).

The court concluded (*id.*, 27a), "[f]rom an examination of the voluminous record, which * * * was printed in its entirety and submitted here,"[4] that it was

> perfectly clear that The Star's position in metropolitan Kansas City was of such dominance in the field in which it did business during the indictment years that it could be found by the jury that it possessed monopoly power, that it was an indispensable medium of advertising for some advertisers (See *Lorain Journal, et al.* v. *United States*, supra, 1951, 342 U. S. 143, 152), that its position gave

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columns, etc. (R. 1619–1624, 1767–1770). On the basis of such factors, the Audit Bureau of Circulation (a non-profit organization comprised of advertisers, advertising agencies and publishers, which audits newspaper circulation figures, R. 1589) listed the morning *Times* and the evening *Star* as different papers (R. 1598–1600).

[4] The printed record contains 3148 pages.

> it the power to exclude competition, and that it exercised such power for the purpose and with the intent so to do, within the meaning of the Sherman Anti-Trust Act

and that there was also "substantial" evidence "as to Sees' attempts to monopolize in the dissemination of advertising" (*id.*, 29a).

1. Threats of refusal to accept advertisements from, or otherwise to discriminate against, advertisers who used competitive publications

On numerous occasions, advertisers in the morning *Times* and/or the evening *Star* were threatened that Star would refuse to take their ads if they patronized competing papers (R. 460, 915, 1167–1172, 1234–1236, 1246–1263, 1322–1325, 1333–1335, 1572–1574). Thus, when theatre manager Hartman, who had daily ads in both papers, placed an ad in the competing *Journal-Post*, a Star advertising solicitor visited him and "told me, to get our ads out of The Journal-Post and not to put them in there" (R. 1333). Although Hartman withdrew the ad, the *Journal-Post* continued to run it without charge (R. 1333–1335), and the Star solicitor told him that "they were still unhappy with the ad in The Journal Post and that they were going to leave it out of the Kansas City Star and Times" (R. 1334). Hartman's ad was left out of the morning *Times* and upon inquiry he was told by the solicitor "that it would be back in the next day but to be sure and get my ad out of The Journal Post" (R. 1335). He did so (R. 1338).

Star also discriminated against advertisers who used competing publications by giving their ads an inferior position in the paper or "burying" them (R. 434, 438–442, 464–470, 610–611, 706–708, 716–718, 875–876, 913–914, 937–938, 941, 1048–1052, 1105–1107, 1356–1358, 1412–1415, 1428–1429, 1477–1478, 1483, 1533–1536, 1613–1614, 1652–1654, 1660–1664, 1667; GX 148–149, R. 1106, 1107, 2751–2755). The position which an ad occupied was important to advertisers (R. 713–719, 741–742, 782–783, 842–843, 878–879, 996, 1047–1049, 2273, GX 148, 149, R. 1106, 1107, 2751–2755). The purpose of this practice is revealed by Sees' comments with respect to a complaint by a regular Star advertiser about the poor position he had received in Star papers after he had used the competing *Journal-Post*. "Well, we will put his ad wherever we want to, bury it if we want to and teach him a lesson to stay out of the Post" (R. 588). When the advertiser renewed his protest later, Sees remarked, "Well, we will put him any place we darn please. We will teach him another lesson to stay out of the Post" (R. 590).[8]

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[8] The record contains a number of written notes from Sees to his advertising solicitors referring to the fact that regular advertisers in the Star papers had ads appearing in the competing *Journal-Post* and instructing "Let's get him out of there" (GX 121, 109, 120, 79, R. 1210, 545, 1208, 537, 2733, 2729, 2731, 2721). When a Star advertiser was also using the *Journal-Post*, Star advertising solicitors had a standing instruction to "get them out of the Journal into the Star exclusively." (R. 662.)

A typical instance of this kind of discrimination was described by the Court of Appeals as follows (Pet. No. 985, 16a):

> A dance studio manager testified that in 1952 he found the studio's ad missing from the usual position in The Sunday Star. One of the studio owners said that she had spent considerable time in search for it and then complained to The Star. In explanation of the change of position, a solicitor told her, "Well, I assumed that you didn't appreciate the place which you have been getting because I notice you have an ad in the News Press." The ad was withdrawn from the News Press and the following week the Studio ad reappeared in the customary position in The Sunday Star. [See R. 716–718, 937–938, 941.]

Another kind of threat made by Star against an advertiser who used a competing newspaper was described by the Court of Appeals as follows (*id.*, 17a):

> An example of the use of the dissemination of news to control advertising is illustrated in the instance of a big league baseball player who was a partner in a florist's shop in Kansas City. The florist shop also advertised in the Journal-Post. A Star solicitor informed one of the partners that The Star would discontinue publicizing the baseball player if the florist shop continued using the Journal-Post for advertising, Sees instructing a Star solicitor to tell them, "* * * to get out of the Journal-Post or he wouldn't get any sports, that he wouldn't get any cooperation from the sports desk on anything that he did in organized baseball." Sees

instructed the solicitor, "* * * Sees told me that if, that if I didn't get the ad in the Post to go out and tell Gleeson that if he knocked 100 home runs in the year his name would never appear in the paper outside of the box score and it got so hot to me that I told Gleeson to come down to The Star to get me off the hook with Mr. Sees," and the solicitor for The Star then told the advertiser, "I told him that they wanted him out of the Post and that if he didn't get out of the Post that he wouldn't get much sport write-up from the sport desks." [See R. 583–585, 1431–1433, 1520–1521.]

Gleeson discontinued running his florist shop ads in the *Journal-Post* (R. 585).

Similar threats were issued to other Star advertisers (R. 1130–1132, 1459–1463).

Star advertisers who used competing publications were threatened with having their credit cut off (R. 642–647, 649–651). Thus, when a Star advertiser placed a $20 ad in a throwaway sheet (R. 643) (as against a charge of $1,000 for comparable space in the morning *Times*, R. 644), a Star representative called on him "to collect the amount due for The Star inasmuch as he noticed we had money to throw away on these neighborhood throw sheets, and that he was going to have to put us on a current basis so far as further advertising was concerned" (R. 647). The advertiser never again used the throwaway (*ibid.*).

Advertisers who used competing publications were required to take the same space in the Star papers, at the substantially higher rates which the latter charged because of their much larger circulation (R.

579–582, 643–647, 1297–1300, 1356–1358, 1490–1491). Harold Price, the owner of an appliance company, testified that when he started using the *Journal-Post* in 1941, he was called to Star's office and ordered to explain this advertising and that, after hearing his explanation, Star's then advertising director, in Sees' presence, demanded that Price buy from Star the same amount of space he was using in the *Journal-Post*. When Price replied that he could not afford to do this because of Star's far higher rate, he was told that if he would not give Star equal space "that I should give all my advertising to The Kansas City Journal and give them a chance to prove to me that they could produce business for me or not" (R. 1298). After further protests, Price discontinued all advertising in the *Journal-Post* and continued to advertise in the Star papers (R. 1297–1300).

2. The forced combination advertising rate

Star required classified and general advertisers to place ads in both the morning *Times* and evening *Star*, even though such advertisers desired to use only one of the papers. A long list of advertisers in many fields (theatres, grocers, automobiles, appliances, real estate, etc.) testified that, because of the different advertising utility of the morning and evening papers, they wished to use only one, but that Star and Sees would not permit it (R. 648–649, 654–655, 773, 975, 1069, 1075, 1270–1271, 1504, 1546, 1569–1570, 1577–1578, 1585; GX 10, 157, R. 1220, 1578, 2551, 2758). As one advertiser explained (R. 1569–1570):

> We advertised in the Times because we have to advertise in it due to the Star's policy * * *

> I don't think that the ad that we run in the Times is of any value to us.

The forced combination policy was not applicable to local display advertising. Local grocers, who were thus free to select their advertising medium, placed more than 98.5% of their lineage in the morning *Times,* and only 1.5% in the evening *Star* (GX 200, p. 2, R. 2030, 2788). Western Auto Stores, which was classified by Star as a local advertiser, placed approximately 203,000 lines in the evening *Star* as against 6,000 lines in the morning *Times.* On the other hand, Western's competitor, Firestone Tire, was treated as a national advertiser and as such placed almost the identical lineage in both papers, even though the Firestone dealers objected strenuously to doing so (R. 505, 604–607, 2031, 2033).

Advertising experts testified that the forced combination rate operates to exclude competing advertising media from the market, since it uses up advertising budgets by compelling advertisers to spend more money in the combined papers than they would do if they had a free choice of media (R. 1059–1060, 1064, 1065). As a theater owner explained, "Well, the reason that we didn't advertise in the [Kansas City] Kansan was because most of our advertising budget was taken by the Star ads" (R. 1569–1570).

3. The forced combination subscription rate

Star followed a policy of requiring subscribers to purchase both the morning *Times* and the evening *Star,* even though they wanted only one of the papers

(R. 1948; GX 25, 26, 27; R. 1625, 2559, 2560, 2561–2562). The result of this practice, as an advertising expert testified (R. 1552), was that the subscriber would be unlikely to buy a second morning or evening paper. Furthermore, during the period 1936 to 1942, when the *Journal-Post* was competing with the evening *Star*, the weekly charge for the 13 editions (six morning, six evening, and one Sunday) was only 15 cents (GX 59, R. 1017, 2657; GX 73, R. 1022, 2709). As petitioners' own journalism expert, Dr. Frank Luther Mott, stated (R. 2261), under such circumstances "it is small wonder that competitors found the way difficult." Significantly, this price was raised to 20 cents in 1942 after the *Journal-Post* discontinued publication (GX 73, R. 1022, 2709), even though at that time Star's total operating costs were falling and its advertising income was rising (GX 190, 196, R. 1703, 2784, 2786).

ARGUMENT

At the outset, it should be emphasized that the lengthy record in this case is replete with extensive evidence showing, not only the possession of monopoly power, but also the specific intent to use that power and the actual exercise of that power through a variety of coercive and predatory practices. See Statement, *supra*, pp. 5–15. There is therefore plainly no basis for petitioners' apparent assertion (*e. g.*, Pet. No. 985, pp. 5–7, 10, 29) that their convictions rest solely on the mere fact that Star publishes the only daily newspapers of general circulation in the Kansas City area. To an unusually large extent, this case

turns on factual issues which the jury resolved against the petitioners. The court below, after a careful and exhaustive analysis, sustained the jury's verdict, and there is no occasion for further review.

1. Petitioner Star contends (Pet. No. 985, pp. 6–15) that the decision below, upholding its conviction of attempting to monopolize, and of monopolizing, the dissemination of news and advertising by newspapers and radio and television broadcasting stations in the metropolitan Kansas City area, is in "direct conflict" (*id.*, p. 8) with *United States* v. *E. I. du Pont de Nemours & Co.*, 351 U. S. 377 (the *Cellophane* case). It argues (*id.*, p. 9) that, "[u]nder the doctrine of the *Cellophane* case," various other news and advertising media "are competing in the same market" with the Star; and that the District Court "removed from the jury's consideration the question of the appropriate market by systematically excluding the very evidence which would have enabled the jury to pass upon this question" (*id.*, p. 12). Similarly, petitioner Sees contends (Pet. No. 986, p. 14) that the District Court, contrary to *Cellophane*, erroneously "defined the market as a matter of law, rather than submitting this issue to the jury as an issue of fact, and arbitrarily delineated the market" too "narrowly."

A. It should be noted, however, that *Cellophane* dealt with a charge of actual monopolization. And the *Cellophane* opinion itself points out (pp. 395–396) that the relevant market for determining monopoly power may be substantially narrower where an attempt to monopolize is involved rather than actual

monopolization. In the instant case, Star was charged with and convicted of both attempt to monopolize and monopolization, and the District Court specifically "adjudged that the defendant is guilty as charged and convicted" (R. 330). While the court treated the offenses as merging for sentencing purposes (R. 326), plainly the judgment of conviction on the attempt count was not thereby wiped out. "[A] judgment upon an indictment containing several counts, with a verdict of guilty upon each, will be sustained if any count is good, and sufficient in itself to support the judgment." *Whitfield* v. *Ohio,* 297 U. S. 431, 438; *Hirabayashi* v. *United States,* 320 U. S. 81, 85. Since the $5,000 fine imposed on Star was authorized on either count, the judgment must stand if the conviction of attempt to monopolize was valid. We submit that it clearly was.

As an illustration of the narrower scope of the market in cases of attempts to monopolize, the Court in *du Pont* cited (note 23, pp. 395–396) *Lorain Journal* v. *United States,* 342 U. S. 143. We believe that, insofar as the issue of "relevant market" is concerned, that case fully supports the Star's conviction of attempt to monopolize. There this Court upheld a district court decision that the publisher of the only daily newspaper in Lorain, Ohio, had attempted to monopolize the dissemination of news and advertising in that city. The *Journal* sought to drive a competing radio station off the air by tactics similar to those used by the Star. It "refused to accept local advertisements in the Journal from any Lorain Coun-

ty advertiser who advertised or who appellants believed to be about to advertise" over the radio station (p. 148). This Court pointed out (p. 152) that the paper's "substantial monopoly" in Lorain, together with its coverage of 99 percent of the families there, made it "an indispensable medium of advertising for many Lorain concerns." It held (p. 154) that "a single newspaper, already enjoying a substantial monopoly in its area, violates the 'attempt to monopolize' clause of § 2 when it uses its monopoly to destroy threatened competition." Yet obviously the *Journal*, competing in an extremely narrow market, was subject to the same kind of competition from other news and advertising media in the area that petitioners point to in the instant case. Cf. *United States* v. *E. I. du Pont de Nemours & Co.*, No. 3, this Term, decided June 3, 1957, slip opinion, pp. 6–9; *Greenspun* v. *McCarran*, 105 F. Supp. 662 (D. Nev.).

B. In any event, with respect to Star's conviction of monopolization, the trial court properly left it to the jury to determine, under proper instructions, whether, in view of the competition of other media, Star had monopoly power in the market where it did business.* The court, after defining monopoly power as the power "to exclude actual or potential

* Petitioner Star contends (Pet. No. 985, p. 12) that the District Court "systematically" excluded "the very evidence which would have enabled the jury to pass upon this question" of "the appropriate market." The only evidence which the court completely excluded, however, dealt with billboards and national magazines. Petitioners offered no evidence that there was any "cross-elasticity of demand" between these media and Star's newspapers,

competitors from any part of the trade or commerce among the several states, provided that he or they have the intent or purpose to exercise that power" (R. 2444), pointed out to the jury that "[t]he Government contends that the relevant market which the defendants are charged with attempting to monopolize and to have monopolized in the metropolitan area is the dissemination of news and advertising in a four county area by daily newspapers along with radio and television broadcasting stations" (R. 2446); that "[o]n the contrary, the defendants contend that the relative or comparative market is broader than that encompassed by the Government, that is, the daily

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in the sense that these media were "effective substitutes" for Star because they were "reasonably interchangeable by consumers for the same purposes" (*Cellophane* case, *supra*, p. 395). On the other hand, a large number of metropolitan Kansas City advertisers repeatedly testified that they were primarily dependent on Star (R. 388, 470, 795, 848, 899, 945, 1056, 1130, 1198–1199, 1298, 1415, 1463, 1658), and that they agreed to stop using various limited circulation local publications rather than endanger their advertising with Star (R. 378–379, 438–439, 469–470, 706–708, 739–741, 755–758, 937–938, 1131–1132, 1135–1137, 1262–1263, 1298–1300, 1333–1335, 1365–1369, 1412–1415, 1462–1463, 1477–1478, 1505–1507, 1520–1521, 1573–1574, 1654–1655, 1663–1664, 2735–2746; GXs 137–144).

"Illegal power must be appraised in terms of the competitive market for the product" (*Cellophane* case, p. 393). The Court of Appeals did not err in concluding (Pet. No. 985, pp. 24a–25a) that, "with due regard to the realities of newspaper advertising," neither national magazines nor billboards were shown by the record to be "market alternatives" or "effective substitutes" for Star. Indeed, Star itself made such a distinction when it compelled an advertiser to discontinue buying space in the *Kansan* and other local media, while at the same time disavowing any objection to his advertising in a national magazine, *The Ladies Home Journal* (R. 468–469).

newspapers and the radio and television broadcasting stations, and should include weekly newspapers, magazines, billboards, car cards, handbills, religious and other publications which are published, created or produced in the defined area" (*ibid.*); and that it was for the jury to "determine for themselves the factual situation as to what is and what is not in competition in the dissemination of news and advertising within the metropolitan area" (R. 2447). The court further charged that "[m]onopolization need not extend to all substitute or alternative advertising media or dissemination of news" (R. 2446), and it instructed the jury that it "may take into consideration their common experiences in the affairs of life * * * in determining the question of whether or not the defendant Star was in a dominant or monopolistic position" (R. 2446–2447).

This charge, we believe, fully complied with the principles enunciated by this Court in the *Cellophane* case. There this Court pointed out (351 U. S. at 404) that "[t]he 'market' which one must study to determine when a producer has monopoly power will vary with the part of commerce under consideration," and that "[i]n considering what is the relevant market for determining the control of price and competition, no more definite rule can be declared than that commodities reasonably interchangeable by consumers for the same purposes make up that 'part of the trade or commerce,' monopolization of which may be illegal" (p. 395). On that basis, the Court

affirmed the trial court's holding that the relevant market involved was not cellophane, but the broader area of flexible packaging materials, in which du Pont did not have a dominant position. It did so "[o]n the findings of the District Court" (p. 404) that cellophane and other flexible packaging materials had a "very considerable degree of functional interchangeability" (p. 399), and that there was a "'[g]reat sensitivity of customers in the flexible packaging markets to price or quality changes,'" which "prevented du Pont from possessing monopoly control over price" (p. 400).

In the instant case, however, there was extensive evidence (see *supra,* note 1) that Star's newspapers were, as the court below stated (Pet. No. 985, 14a), "an indispensable advertising medium for many advertisers." There was thus posed a factual question for the jury, namely, "what is and what is not in competition in the dissemination of news and advertising within the metropolitan area," and the jury resolved it against petitioners and for the Government. In the language of *Cellophane,* the jury concluded, on the basis of the evidence, that Star's papers were not "reasonably interchangeable by consumers for the same purposes" with the other media upon which petitioners relied.

As this Court has noted, "[t]he advertising industry and its customers * ** * markedly differentiate between advertising in newspapers and in other mass media." *Times-Picayune Publishing Co.* v. *United*

States, 345 U. S. 594, 612, note 31. The Court there also warned (*ibid.*) that the circle marking the boundaries of the "relevant market" "must be drawn narrowly to exclude any other product to which, within reasonable variations in price, only a limited number of buyers will turn." Applying this standard, the court below correctly held that the evidence in this case justified the jury's finding that Star had monopoly power over the dissemination of news and advertising through newspapers and broadcasting stations in metropolitan Kansas City, notwithstanding the existence in the area of other media which, to varying degrees, also were engaged in that business. Cf. *United States* v. *E. I. du Pont de Nemours & Co.,* No. 3, this term, decided June 3, 1957, slip opinion, pp. 6–9.

2. Petitioners contend (Pet. No. 985, pp. 16–23; Pet. No. 986, pp. 10–13) that the court below held that use of the unit advertising rate was a *per se* violation of the Sherman Act (No. 985, pp. 5, 16; No. 986, p. 13), and that this ruling conflicts with *Times-Picayune Publishing Co.* v. *United States,* 345 U. S. 594, and *Syracuse Broadcasting Corp.* v. *Newhouse,* 236 F. 2d 522 (C. A. 2). Star argues (Pet. No. 985, p. 18) that in *Times-Picayune* "this Court held that the use of the unit rate by a sole trader did not constitute * * * an attempt to monopolize under Section 2," and that "[*a*] *fortiori,* it cannot, by itself, constitute a consummated monopolization under Section 2 of the Sherman Act." Star also makes a similar ar-

gument (*id.*, 6, 23–25) with respect to the holding below on the forced combination subscription rate.

In *Times-Picayune*, however, this Court made it clear that it was not adjudicating the legality of the unit rate system generally, but was holding only that the trial court's finding that the system *as there used* constituted an attempt to monopolize could not stand because the "record cannot bear out the specific intent essential to sustain an attempt to monopolize under §2" (345 U. S. at 627).[7] The Court stated (pp. 627–628, emphasis added):

> We conclude, therefore, that *this record* does not establish the charged violations of § 1 and § 2 of the Sherman Act. *We do not determine that unit advertising arrangements are lawful in other circumstances or in other proceedings.* Our decision adjudicates *solely* that *this record* cannot substantiate the Government's view of this case.

As the court below correctly held (Pet. No. 985, p. 21a), "The *Times-Picayune* case was, in the last analysis, determined on the basis of a failure of proof," and tying arrangements, such as the unit advertising rate and the forced combination subscrip-

[7] Although proof of specific intent to monopolize is necessary to establish an attempt to monopolize (*Swift & Co.* v. *United States*, 276 U. S. 311; *United States* v. *Columbia Steel Co.*, 334 U. S. 495, 532), such a showing is not required to prove monopolization itself. "It is sufficient that a * * * monopoly results as the consequence of a defendant's conduct or business arrangements." *United States* v. *Griffith*, 334 U. S. 100, 105.

tion, "must be judged amidst the circumstances and surroundings in which they operate."[8]

In submitting this case to the jury, the trial court fully explained the significance of intent under Section 2. It repeatedly pointed out (R. 2443–2444, 2447) that an attempt to monopolize requires a "specific intent" to obtain a monopoly, carefully defined such intent (R. 2447–2448), and contrasted it with the "general intent" which is sufficient to support a charge of monopolization and which "is a fact to be proved like any other fact, by acts, conduct and circumstances" (R. 2448). The court charged that "if you find that the defendants used the forced combination arrangement

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[8] Similarly, the *Newhouse* case does not enunciate any general rule with respect to the legality of the unit advertising rate, but turns on the particular facts there involved. In *Newhouse*, a radio station in Syracuse, New York, brought a private antitrust treble damage action against the publishers of the only two newspapers in town (and a competing radio and television station) alleging, *inter alia*, that use of the unit advertising rate constituted both a conspiracy in restraint of trade (in violation of Section 1), and an attempt to monopolize and actual monopolization (in violation of Section 2). The District Court granted summary judgment in favor of the defendants on both charges. The Court of Appeals affirmed the ruling as to the Section 2 claim, on the narrow ground that the "undisputed evidence" showed that the defendants' "share of the total advertising revenue" of newspapers and broadcasting stations in the Syracuse market "is too low to warrant any inference of monopolization by defendants or any attempt to monopolize" (236 F. 2d 522, 525–526). However, the court reversed the ruling on the Section 1 claim, since it could not say, on the basis of the "confused and cumbersome" record before it, that the plaintiff could not at the trial "prove that, were it not for the existence of the unit arrangement, persons advertising their products in the Syracuse area would devote more of their advertising funds to plaintiff's competing medium" (p. 526).

between two newspapers,* and that the papers or either of them were dominant, and that *such practice was intended to achieve or maintain monopoly,* then I instruct you that you would be justified upon that evidence alone in returning a verdict of guilty, or that you may consider that evidence in conjunction with all other evidence before you, and upon being convinced beyond a reasonable doubt that defendants attempted to monopolize and monopolized in the dissemination of news and advertising in the area as I have already discussed, return a verdict of guilty as to either or both counts" (R. 2456, emphasis added). The court gave a similar charge with respect to the forced combination subscription rate (R. 2456–2457).

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*The court previously had told the jury that they would have to determine the "fact" (R. 2455) whether, as the Government charged (R. 2454), the morning *Times* and the evening *Star* "are separate and distinct newspapers" (R. 2453, 2454), or whether, as the defendants contended, "each of the papers is simply a separate edition of the same papers" (R. 2454–2455).

Petitioner Star contends (Pet. No. 985, pp. 20–22) that "The Star is a single, around-the-clock newspaper," and that the *Times-Picayune* case compels that conclusion. But the rationale of *Times-Picayune* was not, as petitioner contends (Pet. No. 985, p. 20), that the morning and evening papers there involved were but a single paper, but that "nothing in the record suggests that advertisers viewed the city's newspaper readers, morning or evening, as other than fungible customer potential" (345 U. S. 594, at 613). In the instant case, however, there was considerable evidence that advertisers had distinct preferences for one Star paper or the other, but that the unit rate system prevented them from making a free choice between the papers. See Statement, *supra*, pp. 13–14. The Court of Appeals correctly held (Pet. No. 985, p. 21a) that "a question of fact was raised" with respect to whether Star published one or two papers, and that "it was properly left for the determination of the jury."

The competitive impact of the unit advertising rate and the forced combination subscription, and the intent with which Star employed these practices, thus were left for the jury to determine. The court below fully and carefully reviewed the evidence, and concluded that, "[u]nlike *Times-Picayune,* but comparable to the situation presented" in the *Lorain Journal* case (*supra,* p. 17),

> we think the record here could justify the jurors' conclusion that the morning Times and evening Star were two separate newspapers with distinct and separate uses for advertisers; that each was dominant in its own field; that together they dominated the market both morning and evening; and that *the unit advertising method was used, notwithstanding the protests of advertisers, with the intent and effect of excluding competition.* As to the forced combination rate, we think the jurors could properly conclude that the effect upon the average subscriber who must take thirteen papers a week is to foreclose the likelihood he will purchase other competing papers. The result on circulation of smaller papers in the area is self-evident. We find no error in the court's submission of these issues to the jury. [Pet. No. 985, pp. 21a–22a; emphasis added.]

We submit that the foregoing rulings by the Court of Appeals on these factual questions were correct, and that their validity presents no question of general importance justifying further review by this Court.

3. Petitioner Star further contends (Pet. No. 985, pp. 26–28) that the court below erred in approving

the District Court's charge that Star might be convicted of monopolization if it had both monopoly power and the intent to exercise such power, whether or not such power "actually be exercised" (R. 2444). It argues that, although non-exercise of monopoly power does not preclude a finding of monopolization where a combination or conspiracy to monopolize is involved, a different rule should apply in cases of monopoly by a single trader.

The decisions of this Court, however, draw no such distinction. In *American Tobacco Co.* v. *United States*, 328 U. S. 781, the Court held (p. 809) that "actual exclusion of competitors is not necessary to" "the crime of monopolization in these cases under § 2 of the Sherman Act." While the case involved a combination and conspiracy to monopolize, the holding that proof of actual exclusion of competitors is unnecessary did not rest on that ground, but on the broader rationale that "the material consideration in determining whether a monopoly exists is not that prices are raised and that competition actually is excluded but that power exists to raise prices or to exclude competition when it is desired to do so" (p. 811).

In *United States* v. *Griffith*, 334 U. S. 100, this Court, citing *American Tobacco*, expressly stated (pp. 106–107, footnotes omitted):

> Section 2 is not restricted to conspiracies or combinations to monopolize but also makes it a crime for any person to monopolize or to at-

> tempt to monopolize any part of interstate or foreign trade or commerce. So it is that monopoly power, whether lawfully or unlawfully acquired, may itself constitute an evil and stand condemned under § 2 even though it remains unexercised. For § 2 of the Act is aimed, *inter alia*, at the acquisition or retention of effective market control.

See also *United States* v. *Aluminum Co. of America*, 148 F. 2d 416, 427, 428–429, 432 (C. A. 2); *United States* v. *United Shoe Machinery Corp.*, 110 F. Supp. 295, 297, 342–343 (D. Mass.), affirmed *per curiam*, 347 U. S. 521.

Thus, even assuming that it were necessary to consider the validity of Star's conviction of monopolization (see *supra*, p. 16), the court below (Pet. No. 985, pp. 33a–34a) was clearly correct in holding that, "[i]f the essential elements of the offense of monopoly are present, the law applies, whether the prosecution is against one or several acting in concert."

4. Petitioner Sees, who was convicted only of attempt to monopolize, contends (Pet. No. 986, pp. 16–18) that the trial court improperly defined that offense. The court told the jury that an attempt to monopolize "means the employment of methods and practices which are utilized for the specific purpose and with the specific intent to achieve or build a monopoly, and which, if successful, *would be likely to accomplish monopolization*" (R. 2443, 2444, emphasis added). Sees argues that *Swift & Co.* v. *United States*, 196 U. S. 375, and *American Tobacco Co.* v.

United States, 328 U. S. 781, as well as decisions of other courts of appeals, establish that an attempt to monopolize requires proof of a "dangerous probability" that the attempt will succeed, and that the "likely to accomplish" language used by the district court in the instant case was therefore erroneous and in conflict with those cases.

We submit, however, that the Court of Appeals correctly concluded (Pet. No. 985, p. 32a) that "[t]he phrase 'dangerous probability' carries with it no substantially different meaning to the average person than the phrase 'likely to accomplish' ", and that the court's charge placed no "lesser burden on the government than that contained in the definition approved by the Supreme Court in the *American Tobacco Co.* case." As the court pointed out (*ibid.*): "[t]rial courts are not bound to use the specific language contained in requested instructions or in instructions approved by appellate courts, but may use their own language so long as it conveys to the jurors proper understanding and meaning. Attempts to commit crime have been defined by many courts in many ways. * * * Here the trial court's requirement of a finding of 'specific intent' plus likelihood of accomplishment is certainly tantamount to the 'dangerous probability' in the definition relied on by Sees. In the *American Tobacco Co.* case, the Supreme Court was merely approving the trial court's definition but was not saying that that exact language had to be used in all such instructions."

5. Petitioner Sees further argues (Pet. No. 986, pp. 18–23) that he was denied a fair trial. He contends that his rights were prejudiced by being tried jointly with Star (*id.*, 7–8, 19), and that the trial court's instructions to the jury failed to differentiate between the evidence admissible as to him and that admissible only as to Star (*id.*, 9, 19–21). These contentions were fully considered and rejected by the Court of Appeals.

As that court noted (Pet. No. 985, pp. 9a–11a), it is well settled that the determination "whether the defendants should be tried together or severally" is a matter "within the sound discretion of the trial judge * * *." *Opper* v. *United States,* 348 U. S. 84, 95. Here, as in the *Opper* case, "there is nothing in the record to indicate an abuse of such discretion when petitioner's motion for severance was overruled." For, as the court below pointed out (Pet. No. 985, pp. 11a–12a), "the [trial] court repeatedly throughout the trial admonished the jury that certain evidence received was not applicable to Sees and carefully charged the jury that Sees could be held responsible only for acts performed by him or under his direction." The fact that the jury acquitted Sees on the charge of monopolization, while at the same time finding Star guilty on that charge, is the short answer to Sees' contention (Pet. No. 986, p. 19) that it was "impossible for the jury rationally to segregate and consider against petitioner only that evidence competent against him." The court below correctly concluded that the "refusal of the trial court to grant

Sees' motion for severance was a valid exercise of discretion * * *."[10]

CONCLUSION

The decision below is correct, there is no conflict of decisions, and no other reason appears for review by this Court. It is therefore respectfully submitted that the petitions for writs of certiorari should be denied.

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[10] Sees further contends (Pet. No. 986, p. 15) that his conviction was not based on his personal conduct, but upon the "erroneous application of the civil doctrine of imputed or vicarious liability." The evidence upon which Sees' conviction rests was fully reviewed by the Court of Appeals (Pet. No. 985, pp. 12a–27a) and it concluded (*id.*, 30a) that the record fully "justified the jury's verdict against him under Count I." The correctness of this factual ruling does not call for further review by this Court.

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